Editor's note: Reconsideration denied and decision clarified by order dated Sept. 5, 1975 -- See 13 IBLA 151A th C below.

EUGENE P. TISCORNIA, SR., AND MARGARET TISCORNIA

IBLA 70-37 Decided September 25, 1973

Appeal from decision (Sacramento 608) by the Office of Appeals and Hearings, Bureau of Land Management, affirming the rejection by the Sacramento Land Office of an application filed under the Mining Claims Occupancy Act.

Reversed and remanded.

Mining Occupancy Act: Principal Place of Residence ! ! Mining Occupancy Act: Qualified Applicant

Where the preponderance of the evidence shows a retired man with asthma, in addition to having a home with his wife in Stockton, California, purchased a mining claim in 1959 from his predecessor in interest who had lived on the claim for 20 years, and applicant lives on the claim from March or April to October or November of each year for 2 or 3 weeks of each such month, obtains relief from asthma during such time, and has made substantial permanent improvements, the claim constitutes a principal place of residence for him and he is a qualified applicant under the Mining Claims Occupancy Act.

Mining Occupancy Act: Generally ! ! Mining Occupancy Act: Qualified Applicant

Section 8 of the Mining Claims Occupancy Act, 30 U.S.C. § 708 (1970), which reads "Rights and privileges to qualify as an applicant under this chapter shall not be assignable, but may pass through devise or descent," refers only to the right of a residential

> occupant!owner whose qualifications have matured as of October 23, 1962, to transfer by devise or descent the rights and privileges to qualify under the Act, although he cannot transfer such rights and privileges by assignment. The section does not prevent a grantee who purchased a claim during the period between July 23, 1955, and October 23, 1962, from qualifying under the Act.

APPEARANCES: Lewis P. Arbios, Esq., Stockton, California, for the appellants; Charles F. Lawrence, Esq., Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the Government (U.S. Forest Service), appellee.

OPINION BY MRS. LEWIS

This is an appeal by Eugene P. Tiscornia, Sr., and Margaret Tiscornia from the decision of February 17, 1969, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision by the Sacramento, California, land office, rejecting their application to purchase a portion of the Madaline quartz mining claim, located in the Stanislaus National Forest, under the Mining Claims Occupancy Act of October 23, 1962, as amended, 30 U.S.C. §§ 701-709 (1970).

By decision of December 30, 1970, this Board set aside the decision below and ordered a fact!finding hearing to be held, pursuant to 43 CFR Subpart 1851, 1/ with instructions for the Administrative Law Judge 2/ to return the record with a recommended decision to the Board for further consideration and decision.

On March 16, 1972, Administrative Law Judge Graydon E. Holt issued his recommended decision, in which he found that Tiscornia is a qualified applicant under the Mining Claims Occupancy Act of October 23, 1962, supra, and as the land sought is under the administration of the Forest Service, that agency will determine

1/ Now 43 CFR § 4.430-4.439.
2/ By order of the Civil Service Commission, the title "Administrative Law Judge" has replaced that of "Hearing Examiner," 37 F.R. 16787 (August 19, 1972).

the nature of the relief to be granted. Upon being duly served with the recommended decision, the Forest Service and the applicant filed briefs.

The Forest Service contends that the applicant uses the claim only intermittently during the summers; his wife lives on the claim only on weekends; and the partial qualification of the predecessor does not inure to the benefit of the Tiscornias, who purchased the claim and did not acquire it "through devise or descent." The applicant in his brief in support of the recommended decision asserts that they were qualified prior to October 23, 1962; the facts, which are not in dispute, establish he used the cabin and the approximately two acres within the claim as a principal place of residence and he is a qualified applicant under the Act.

We have reviewed the recommended decision of the Judge and the record supporting it. Based upon the entire record, we agree with his findings of fact and adopt them. A copy of his recommended decision is attached. As to the arguments made on appeal, we note:

The only issue is whether the mining claim constituted a principal place of residence for the appellants and whether they are qualified applicants within the meaning of the Mining Claims Occupancy Act. Tiscornia, who has bronchial asthma, purchased the mining claim at "Dogtown" in 1959 for $ 1500 in order to escape the pollen in the Central Valley. The seller of the claim and his father before him had lived on the claim continuously for more than 20 years. Beginning in March 1960 and since, Tiscornia has lived on the claim from March or April until October or November of each year for 2 to 3 weeks of each month. During the rainy season 3/ he stays in Stockton, California, admittedly a principal place of residence, where his wife lives except for weekends and where he votes, receives mail, and has a bank account. During 1959 he spent about $ 4500 for improvements, exclusive of his own labor, on the claim site. These included the addition of a bathroom and water tank, general clean!up work, leveling two acres of land, fencing it, and planting a number of fruit trees. Mrs. Tiscornia testified that her husband during the years 1960 through 1968 considered the cabin site at Dogtown his principal place of residence rather than his Stockton home (Tr. 28).

3/ The applicant testified that he did not stay on the claim during the winter rainy season because he got stuck in the mining claim access road, which was not paved. (Tr. 12).

We turn to the law and regulations applicable to this question.

A "qualified applicant" is defined in 30 U.S.C. § 702 (1970) as

> * * * a residential occupant!owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962. (Emphasis supplied.)

Regulation 43 CFR 2550.0-5(d) provides:

> The term "a principal place of residence" means an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy. [4/] (Emphasis supplied.)

With reference to this definition, the Department said in Ola N. McCulloch Sibley, 73 I.D. 53, 58 (1966):

> * * * This is not a comprehensive definition. Rather, it establishes general guidelines which must be applied to all varieties of uses, some of which are clearly residential, some of which clearly are not residential, and some of which are not so clear. Moreover, it will be noted that the term is defined not so much in terms of what is included as in terms of what is excluded. Specifically, it excludes sites which are devoted to recreational and related uses, as distinguished from conventional residential use. [Emphasis added.]

The Department commented in Henry P. Smith, 74 I.D. 378, 384 (1967):

4/ Based upon language used by the Senate and House Committees. See S. Rep. No. 1984, 87th Cong., 2d Sess. 5-6 (1962); H.R. Rep. No. 2545, 87th Cong., 2d Sess. 4 (1962).

> * * * The substance of the provision is that intermittent or sporadic use or occupancy for any purpose while concurrent residence is maintained at a regular place of residence or domicile, as distinguished from occupancy for at least a substantial part of each year to the exclusion of maintenance of regular residence elsewhere during the same period, is not qualifying under the act. [Emphasis added.]

We point out the Judge's evaluation of the facts in the instant case when he states:

> The applicant * * * is retired, has suffered from an asthmatic condition for years, and gets relief from this condition while living in the cabin at a higher elevation than in his house at Stockton, particularly during the spring, summer, and fall months. This gave him a strong motivation for living at the cabin during the greater part of the year and since he was retired there was no reason for him not to be there. He made permanent improvements on the cabin at considerable expense, cleared and fenced two acres around the cabin, and planted fruit trees which require frequent irrigation during the summer. It is significant that he performed much of this work personally during the crucial years from 1959 to 1962 shortly after he acquired the property. This work would have required his physical presence on the property over extended periods.

In sum, then, the applicant's occupancy of the mining claim during the critical period was much more than intermittent or sporadic, and, in fact, was for a substantial period of time during each year. Based on the entire record we find the preponderance of the evidence supports a finding that the mining claim at Dogtown was a principal place of residence for Eugene P. Tiscornia, Sr. during the critical years and that he is therefore a qualified applicant under the Act of October 23, 1967, supra. Frank O. O'Mea, 10 IBLA 187 (1973); see Bernice H. Doll, A-31141 (April 27, 1970). We further find that the evidence is insufficient to support a finding that the mining claim was a principal place of residence for Margaret Tiscornia under the Act, and we therefore find that she is not a qualified applicant under the Mining Claims Occupancy Act.

The Government's contention that the applicants are not qualified because they purchased the claim and did not acquire it "through devise or descent" 5/ is untenable. Section 2 of the Mining Claims Occupancy Act, 30 U.S.C. § 702 (1970), supra, permits the tacking of possession by a grantee or purchaser during the period between July 23, 1955, and October 23, 1962, and has no connection with section 8 of the Act, footnote 5, supra. The latter refers only to the right of a residential occupant!owner whose qualifications have matured as of October 23, 1962, to transfer by devise or descent the rights and privileges to qualify under the Act, although he cannot transfer such rights and privileges by assignment. See William Rafferty, 77 I.D. 26, 30 (1970). In Frank O. O'Mea, supra, the claimants considered qualified by this Board purchased the claim therein involved in April 1960.

As stated above, we have found Tiscornia to be a qualified applicant. However, where the land applied for has been withdrawn in the aid of a function of an agency other than this Department, the Secretary of the Interior may convey an interest in the land only with the consent of the head of the other agency and under such terms and conditions as he may deem necessary. Since the land sought here is in a national forest, it is for the Forest Service to determine the nature of the relief to be granted. Bernice H. Doll, supra.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the case is remanded for further action consistent with the decision herein.

Anne Poindexter Lewis
Member

I concur:

Newton Frishberg
Chairman

5/ This refers to 30 U.S.C. § 708 (1970), which reads: "Rights and privileges to qualify as an applicant under this chapter shall not be assignable, but may pass through devise or descent."

DISSENT OF MR. RITVO

I would find the Tiscornias are not qualified occupants of the Madeline Quartz Mining Claim within the meaning of the Mining Claims Occupancy Act of October 23, 1962, 43 U.S.C. § 701 et seq. The majority opinion, in my view, disregards one criterion by which an applicant's qualification has been judged in the past and liberalizes another to an unwarranted degree.

First, it holds qualified an applicant, who lives on a claim for at most 6 or 7 months, although the claim is habitable year round.

While it is well established that an applicant under the Act may have more than one principal place of residence, it is equally well established that the applicant is permitted to reside away from the claim for extended periods only where full!time residence on the claim is impossible as a practical matter. Bernice H. Doll, A-31141 (April 27, 1970); Christian E. Wicks, 73 I.D. 166, 171 (1966); H. T. Crandell, 72 I.D. 431, 434 (1965). 1/

As both the Bureau of Land Management decision and the recommended decision concluded, the claim was habitable the year round. There were many year round occupants in the nearby area. In fact it and the adjoining claim had been the year round residences of two elderly men, the Tiscornias' grantor and Mrs. Tiscornia's father, respectively, for many, many years.

Again, as the Bureau decision pointed out, Tiscornia offered as an excuse for not residing on the claim year round only that a road leading from an all weather road to the claim sometimes became impassable in winter. Yet an expenditure of a fraction of what they spent to improve the house would have given them a usable road. I can only conclude that the condition of the road did not constitute a serious obstacle to year round occupancy.

1/ As an example of a circumstance other than climate or topography justifying not living on a claim full!time, the Department has held that absence from a claim because of a physical ailment did not disqualify an applicant. Ola N. McCulloch, 73 I.D. 53 (1956). Here, rather than leaving the claim for reasons of health, Tiscornia says he goes to it to find relief from an asthmatic condition.

Therefore, I would hold that, having failed to reside on the claim full time, although such residence was not impossible as a practical matter, the Tiscornias are not qualified for the relief provided by the act. The majority does not comment on this aspect of the case.

Next, even if we assume the claim was not suitable for residence in the winter, the majority greatly extends and liberalizes the Mining Claim Occupancy Act in another direction. Up to now, as we have seen, it has been held that a qualified applicant may have more than one principal place of residence, but that he may not have two principal places of residence at the same time. That is, he may have a principal place of residence other than on the mining claim in the winter and another during the summer on the claim. He has not, however, been permitted to have two principal places of residence, one off and one on the claim, at the same time.

As the Department said in Henry P. Smith, 74 I.D. 378, 384 (1967), quoted by the majority:

> [I]ntermittent or sporadic use or occupancy for any purpose while concurrent residence is maintained at a regular place of residence or domicile, as distinguished from occupancy for at least a substantial part of each year to the exclusion of maintenance of regular residence elsewhere during the same period is not qualifying under the act. See Cora Pruett, A-30524 (April 28, 1966); Herman C. Kampling, A-30592 (September 26, 1966); Jack T. Lofstrom, A-30699 (March 23, 1967). [Emphasis added.]

The majority recognizes the Stockton home was a principal place of residence for Tiscornia in the summer as well as in the winter. Yet it holds qualified an applicant who has two principal places of residence in the summer, one off and one on the claim. This, in my opinion, is an unwarranted extension of the remedial purposes of the act.

In commenting on the bill that became the Act, the Senate Committee on Interior and Insular Affairs said:

> The bill is a relief measure designed to aid those qualified persons on whom a hardship would be visited were they required to move from their long

established homes. S. Rep. 1984, 87th Cong., 24 Sess. 3 (1962).

> [I]ntermittent use * * * [is] not intended to be covered. * * * Id. 6.

In Jack N. Walker, A-30492, (April 28, 1966), aff'd, Walker, v. Udall, 409 F.2d 477 (9th Cir. 1969), the Department commented, after citing the Senate Committee report:

> In other words, the purpose of the law is to preserve homes for qualified occupants of mining claims, places where they have lived for years and from which their forced removal because of the invalidity of the mining claims would be a real hardship. There was no solicitude expressed by the Congress for the person who has a home elsewhere and who merely occupied the mining claim on a limited basis or for a limited purpose. Such a person would not be uprooted from a home if denied the right to occupy the claim.

In Funderberg v. Udall, 396 F.2d 638 (9th Cir. 1968), affirming Carol V. Funderberg, A-30514 (June 14, 1966), the court said:

> The Hearings S. Committee on Interior and Insular Affairs, S. 3451, 87th Cong., 2d Sess. (1962), pp. 11-12, U.S. Code Congressional and Administrative News 1962, p. 1326, show that the Act of October 23, 1962, was a statute to relieve the hardship which would be visited upon persons who were living on their unpatented claims, but would be evicted under the 1955 statute, supra, and would "have no place to go" if the relief proposed in the 1962 bill was not granted. The plaintiff's situation did not fall within either the letter or the purpose of the 1962 statute.

The Department has given great weight to the consideration of whether the occupant resided at a place other than the claim during the period of the year in which residence on the claim was feasible. It has stated:

> [A] principal place of residence must be in nature of a home which the occupant leaves periodically only because adverse weather conditions or some similar

> circumstance makes it impractical for him to live there on a year round basis. H. T. Crandall, 72 I.D. 431, 434 (1965).
>
> Again and again it has repeated:
>
> > The essence of the Department's rulings in giving practical effect to ["a principal place of residence"] has been that intermittent or sporadic use or occupancy for any purpose while concurrent residence is maintained at regular place of residence or domicile, as distinguished from occupancy for at least a substantial part of each year to the exclusion of a home elsewhere during the same period, is not qualifying under the act. Eveline Schafer, A-30901 (May 5, 1968); Robert L. Shipley, A-30877 (April 25, 1968); Harry P. Smith, supra.

In a recent case it held that residence on the claim for 3 or 4 weeks in the spring, 6 weeks in July and August, and several weeks in October and November, while maintaining a home in San Francisco, where the applicant worked, was not a qualifying use. Charles H. Waugaman, A-31071 (January 16, 1970).

In an earlier application of the same principle, it held to be non!qualifying a use as frequent as twice a week of a claim suitable for continuous occupancy for several months of the year, where the applicant maintained at the same time a home elsewhere to which he was bound by his employment and the education of his children. Herman C. Kampling, A-30592 (September 26, 1966). See also Jack T. Lofstrom, A-30699 (March 23, 1967).

Let us now examine the "residence" qualifications of Tiscornia. There is no question that his home in Stockton is a principal place of residence. It is a substantial, comfortable home in which he lives exclusively for at least 5 months of the year. He votes in Stockton, receives his mail in Stockton, and banks in Stockton. Mrs. Tiscornia remains there year round except for some weekends. Beginning in March or April and continuing through October or early November he spends some time on the claim. How much time he spent there during the years 1959 to 1962 is of crucial significance.

In a statement accompanying their appeal to the Director, Bureau of Land Management, the Tiscornias said that Tiscornia:

> * * * spend[s] on an average, when the road permits, approximately two (2) weeks out of every month during the year except during the rainy portion of the winter season. * * *

At the hearing, Mrs. Tiscornia testified.

> Q. And how frequent would you be called to go up to Dogtown?
> A. I'd go up on weekends.
> Q. And do you recall how often he [Mr. Tiscornia] came down to Stockton!! oh, say, 1960?
> A. Oh, he'd stay there for two or three weeks out of each month that was good weather.
> Q. You mean he stayed in Dogtown?
> A. He would stay there, yes.
> Q. Then he would be home in Stockton for a week or so?
> A. A week or two, all depending. If he stayed two weeks he stayed two weeks, and if he stayed three weeks he would stay one week in Stockton. Tr. 33.

In other words he first said that even during the summer he spent only 2 weeks a month on the claim, but now has expanded his stays on the claim to 3 weeks in some months.

In summary then, Tiscornia lived on the claim from 2 to 3 weeks during the summer and hardly at all, if ever, in the winter. At all times, summer and winter, his wife lived in their substantial home in Stockton, which Tiscornia left only for the time he spent on the claim.

Tiscornia's occupancy is not of the sort that the Act was intended to protect. The legislative history, Departmental regulation, and court and Departmental decisions make it clear that intermittent residential use for hunting, or vacationing, or weekend use is not qualifying. At best from Tiscornia's point of view his occupancy was for 50 to 75% of the time in the summer, but he left the claim even then to live at his Stockton home for 50 to 25% of the time. We note that the non!qualifying situations set out in the regulation are only illustrative of non!qualifying usage. Henry P. Smith, supra, 384. That is, other more extensive uses may still fail to satisfy the statute and the fact that Tiscornia's

use exceeds the examples cited in the regulation does not automatically qualify him under the act.

In brief, Tiscornia simply did not occupy the claim for a substantial part of each year to the exclusion of the maintenance of a regular residence elsewhere. Therefore, for this reason, too, he is not a qualified occupant within the meaning and purpose of the Act.

In summary then, Tiscornia has failed to establish his eligibility for relief under the act for two reasons. First, an applicant to qualify must use the claim as a place of residence on a year round basis if the claim is habitable year round. Since Tiscornia did not reside on the claim for the 4 to 5 month winter or rainy season, when the claim was habitable, he has not met this requirement. Second, if a claim is not habitable on a year round basis, but it is for a substantial part of the year, residence during the period when the claim is habitable is sufficient, but residence then must be maintained for that period to the exclusion of a regular residence elsewhere. Even during the part of the year which he occupied the claim, Tiscornia maintained a concurrent residence at which he spent about half his time. Therefore, he is not qualified even if the residence is judged only on a less than full year basis. 2/

Martin Ritvo
Member

2/ I have made no particular reference to the fact that Tiscornia suffers from asthma and finds relief while living on the claim. If this is so, there is even less justification for his spending only half of his time on the claim.

March 16, 1972

EUGENE P. TISCORNIA, SR., AND MARGARET TISCORNIA	:	Sacramento 608
	:	
	:	Involving the Mining Claim
	:	Occupancy Act

Recommended Decision

Eugene P. Tiscornia, Sr., and Margaret Tiscornia filed an application pursuant to the provisions of the Mining Claim Occupancy Act of October 23, 1962, 30 U.S.C. §§ 701-709 (1964), as amended (Supp. V, 1970), to purchase 5 acres of land within the Madaline Quartz mining claim located in Section 6, Township 3 South, Range 17 East, M.D.M., near the town of Dogtown, Stanislaus National Forest, Mariposa County, California. By a decision of the Sacramento Land Office the application was rejected on the ground that the applicant used the claim only during vacations and weekends and did not occupy the claim as a principal place of residence as required by the Act. This decision was subsequently affirmed by the Office of Appeals and Hearings of the Bureau of Land Management. On appeal to the Interior Board of Land Appeals the Board found that the basic issue to be resolved is the nature and extent of appellants' occupancy of the claim. Because the evidence on this issue was "vague, uncertain and inconclusive," the Board set aside the decision below and referred the case for a hearing to allow the parties to submit additional evidence on this issue.

The hearing was held in Sacramento, California on June 24, 1971. The Forest Service and the applicants were represented by counsel. A brief summary of the evidence presented at the hearing follows.

Mr. Tiscornia was employed for many years in and around Stockton, California, as a fruit buyer. While employed he lived with his wife in their eight room house at 1633 Argonne Drive in Stockton. In the latter portion of his career he often visited his father ! in ! law who lived in a cabin located near Dogtown adjoining the Madaline Quartz mining claim, and while doing so he met C. G. Cunningham, the owner of the claim. Mr. Cunningham and his father before him had lived on the claim continuously for more than 20 years. During these visits he noted that his asthmatic condition was relieved while he was breathing the clear air in the mountains. Dr. W. S. Scott, Jr. verified that Mr. Tiscornia suffers from bronchial asthma, and that he obtains quick relief by going to his "ranch" at Dogtown (Ex. A-7).

In 1959 at the age of 66 Mr. Tiscornia retired from his business and purchased the mining claim from Mr. Cunningham for $ 1500. He moved on the claim in March 1960 and has substantially improved the house by adding a bathroom, water tank, and by general clean ! up work. He also leveled two acres of land around the house, fenced it, and planted a number of fruit trees. There was no disagreement on this background evidence. The controversy developed over the amount of time Mr. Tiscornia has spent on the claim since he acquired it in 1959.

Mr. Tiscornia testified that he purchased the mining claim to get away from the pollen in the central valley, and that he moved into the cabin in March 1960. He stated that since March 1960 he has spent more time on the claim than at his house in Stockton, particularly during the summer months (Tr. 9 and 10). During the winter months he is in Stockton more than on the claim mostly because of the adverse weather conditions (Tr. 12). Since 1959 he has spent $ 4500 for improvements on the claim exclusive of his own labor.

On cross ! examination Mr. Tiscornia testified that he returns to the claim in March or April each year and remains until November (Tr. 17). Occasionally his wife spends a week or two with him and often brings him groceries during the weekends but usually she spends most of her time at the house in Stockton. They both vote, receive mail, and have a bank account in Stockton (Tr. 18).

Mrs. Tiscornia testified that her husband's asthma attacks start in March and then he goes to the cabin where he remains until October or November (Tr. 25-26). On cross ! examination she stated her husband remains at the cabin at least two or three weeks a month when the weather is good (Tr. 33). In discussing her father's residency in the area of the cabin she testified that he stayed in the area all winter until he was 86 years old.

William J. Helmer, a retired Stockton policeman and a neighbor of the applicants in Stockton, testified that he has visited Mr. Tiscornia at his cabin near Dogtown and that he was aware of Mr. Tiscornia's presence at the cabin most of the time except in the winter. From November through the middle of March he stated that Mr. Tiscornia was usually at the house in Stockton. This was because the access from the county road is so bad. Mr. Tiscornia did not want to improve the access road until he was sure the Forest Service would let him have the cabin (Tr. 63-67).

William R. Bamber, a retired judge who has lived in Coulterville on Dogtown Road for 28 years, was called by the Government. He testified that there are usually from two to five snow storms which last for about two weeks each during the winter months. His house is near the road and he can observe the people who go into the Tiscornia cabin. Many times he has seen the Tiscornias coming and going usually during the weekends. The area is good for hunting and he has been near the cabin while hunting. On some occasions the cabin would be occupied and on others it would be

empty. During the summer months he observed Mr. Tiscornia at the cabin more than he did during the winter (Tr. 34-45).

William T. Shimer, a retired State of California Forester, testified at the request of the Government. He was in fire protection and patrolled the area where the cabin is located during the period 1960 to 1970. He stated that Mr. Tiscornia was always very cooperative and was anxious to comply with the State laws. Although the cabin was well maintained he had the impression that Mr. Tiscornia occupied the cabin only occasionally. He did notice that the orchard had been irrigated on his various visits to the claim (Tr. 45-52).

Donald S. Wagner, a road engineer employed by the Forest Service, was called by the Government. He is familiar with the road leading to the cabin and believes it could be graveled and oiled so that it could be used all year round. He was at the cabin on an inspection once a year during 1960, 1961, and 1962 but never saw anyone there. Since that time he has driven down the county road 50 to 100 times a year but did not see the Tiscornias on the claim. The cabin is not visible from the county road. Mr. Wagner has not been at the claim since 1962 (Tr. 53-62).

The Occupational Act authorizes the conveyance of not more than five acres of land actually occupied by a qualified applicant. A qualified applicant is defined as "a residential occupant owner, as of October 23, 1962, of valuable improvements in an unpatented mining claim which constitutes for him a principal place of residence and which he and his predecessors in interest were in possession of not less than seven years prior to July 23, 1962."

There was no question that Mr. Cunningham, the predecessor in interest, qualified during the period 1955 through 1959. The only question raised by the Government is whether Mr. Tiscornia qualified from 1960 through 1962.

In Bernice H. Doll, A-31141 (April 27, 1970), the Department held

> "* * * the statute does not require that the land applied for must have been the principal place of residence for the applicant but only a principal place of residence. H. T. Crandell, 72 I.D. 431 (1965).

In the Crandell decision the Department considered the legislative history of the act which supplied the language for the regulation, 43 CFR 2550.0-5(d). This regulation provides:

> "The term 'a principal place of residence' means an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may

> make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy."

After finding that Crandell used the cabin only intermittently for vacations and other leisure periods, the Department held that he was not a qualified applicant.

In the present case the Government established a prima facie case that the cabin could have been used during the winter time but was not, and that the applicant was not at the cabin on many occasions during the balance of the year. The applicant successfully refuted this case largely by uncontroverted evidence. He is retired, has suffered from an asthmatic condition for years, and gets relief from this condition while living in the cabin at a higher elevation than in his house at Stockton, particularly during the spring, summer, and fall months. This gave him a strong motivation for living at the cabin during the greater part of the year and since he was retired there was no reason for him not to be there. He made permanent improvements on the cabin at considerable expense, cleared and fenced two areas around the cabin, and planted fruit trees which require frequent irrigation during the summer. It is significant that he performed much of this work personally during the crucial years from 1959 to 1962 shortly after he acquired the property. This work would have required his physical presence on the property over extended periods. Also, there was testimony by the applicants and their neighbor that Mr. Tiscornia spends a major portion of his time in the cabin except for the winter months. Although he was not seen at the cabin on numerous occasions by the Government witnesses, the testimony on his behalf demonstrated that his presence at the cabin was substantially more than mere casual or intermittent residential use. It was possible for him to have lived at the mountain cabin during the winter, but it is not surprising that an elderly man owning another principal place of residence at a lower elevation would elect to live at the latter residence during the winter season.

This is sufficient for Mr. Tiscornia to establish that he used the cabin and approximately two acres within the mining claim as a principal place of residence, and that he is a qualified applicant under the Mining Claim Occupancy Act of October 23, 1962, supra.

Although the applicants are qualified to apply there can be no automatic grant of the rights requested. When the land sought is under the administrative jurisdiction of another agency, the act requires the consent of the head of the other agency and under such terms and conditions as he may deem necessary. Since the Forest Service administers the land in issue, it is for that agency to determine the nature of the relief to be granted.

Graydon E. Holt
Hearing Examiner

13 IBLA 151

IBLA 70-37	:	Sacramento 608
	:	
Eugene P. Tiscornia, Sr., and	:	Request for Clarification
	:	
Margaret Tiscornia	:	Case returned

ORDER

The Forest Service, U.S. Department of Agriculture, has filed an instrument styled "Request for Clarification of Decision," which is, in essence, a request or petition for reconsideration of the Board's decision, Eugene P. Tiscornia, and Margaret Tiscornia, 13 IBLA 136 (1973).

In this decision we held that Eugene P. Tiscornia, Sr., is a qualified applicant under the Mining Claims Occupancy Act but that his wife, Margaret Tiscornia, is not. Petitioner contends that by California law the claim is community property, that the application was filed by both parties, not each separately, and if Mrs. Tiscornia is not qualified, then neither is Mr. Tiscornia.

This Board has held that state community property laws are not applicable to unpatented mining claims. United States v. Blythe, 16 IBLA 94 (1974); United States v. McCormick, 5 IBLA 382, 79 I.D. 155 (1972). The rule with respect to the question whether the title to federal land has passed must be resolved by the laws of the United States. It is only after title has passed that the property becomes subject to the operation of state laws. See Solicitor's Opinion M-36416, 64 I.D. 44, 47 (1957).

As pointed out in our decision herein, the relief, if any, which may be granted is within the discretion of the Forest Service. We have no knowledge whether relief will be granted or whether a life tenancy, a tenancy for a period of years, or a fee will issue. The Forest Service may consider the effect of the community property laws of California upon the interest of Mrs. Tiscornia in considering the relief, if any, which it will afford Mr. Tiscornia. Since the relief, if any, is granted by the administering agency, it would be inappropriate for us to go further than we have.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the petition for reconsideration is denied.

Anne Poindexter Lewis
Administrative Judge

I concur:

Newton Frishberg
Chief Administrative Judge

cc: Charles F. Lawrence, Esq.
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ADMINISTRATIVE JUDGE RITVO CONCURRING:

While a review of the Board's decision leaves me still unpersuaded that Mr. Tiscornia is a qualified applicant under the MCOA, I cannot find that contestant has raised any points justifying reconsideration of the case. The substantive facts were considered by the majority in reaching its decision. The Forest Service offers nothing new as to them. It does stress the contention that neither a husband or wife holding a mining claim as community property can be qualified applicant, i.e., a residential occupant-owner. This, I find unpersuasive. Accordingly, I concur in the dismissal of the petition.

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Martin Ritvo
Administrative Judge